

STATE OF MICHIGAN
IN THE SUPREME COURT
Appeal from the Michigan Court of Appeals
Fitzgerald, P.J., Wilder and Murray, JJ.

SHELBY TOWNSHIP,

Supreme Court No. 153074

Respondent-Appellant,

Court of Appeals No. 323491

v

MERC No. 12-000067

COMMAND OFFICERS ASSOCIATION
OF MICHIGAN,

Charging Party-Appellee

**APPELLEE'S BRIEF OF COMMAND OFFICERS ASSOCIATION OF
MICHIGAN**

ORAL ARGUMENT REQUESTED

James R. Andary (P10165)
ANDARY ANDARY DAVIS &
ANDARY
10 S Main Street, Suite 405
Mount Clemens, Michigan 48043
(586) 463-9883
jamesrandary@andarydavislaw.com

John J. Bursch (P57679)
BURSCH LAW PLLC
9339 Cherry Valley Ave SE, #78
Caledonia, Michigan 49316
(616) 450-4235
jbursch@burschlaw.com

Dated: May 24, 2017

TABLE OF CONTENTS

	<u>Page</u>
Table of Contents	i
Index of Authorities	iii
Statement of Jurisdiction	vi
Statement of Questions Presented.....	vii
Statutes Involved.....	viii
Introduction	1
Statement of Facts.....	3
I. The Township’s refusal to collectively bargain	3
II. The charging document.....	4
Proceedings Below	5
I. ALJ Decision and Recommended Order.....	5
II. MERC.....	7
III. Court of Appeals.....	8
Standard of Review.....	10
Argument	10
I. The Court of Appeals and MERC did not err in holding that a local government’s discretionary allocation of health-benefit costs among employee groups is subject to mandatory collective bargaining.	10
A. PERA § 15 regulates public employer-employee relations and should be construed broadly to protect employees.	10
B. There is nothing inconsistent in subjecting PFHICA § 4 cost allocation to PERA § 15 mandatory bargaining.....	12

II.	The Court of Appeals and MERC did not err in holding that a local government must exclude retiree costs when calculating the appropriate rate for active-employee healthcare costs.....	17
III.	The Township has not preserved the question regarding MERC's authority to order unilateral recalculation and reimbursement.	20
	Conclusion and Relief Requested.....	21

INDEX OF AUTHORITIES

	<u>Page</u>
Cases	
<i>Bd of Ed of School Dist for City of Detroit v Parks,</i> 417 Mich 268; 335 NW2d 641 (1983).....	16
<i>Brady v Detroit,</i> 353 Mich 243; 91 NW2d 257 (1958).....	11
<i>Central Michigan University Faculty Assoc v Central Michigan University,</i> 404 Mich 268; 273 NW2d 21	passim
<i>County Road Ass’n of Michigan v Bd of State Canvassers,</i> 407 Mich 101; 282 NW2d 774 (1979).....	11
<i>Detroit Bd of Ed v Parks,</i> 98 Mich App 22; 296 NW2d 815 (1980)	10
<i>Detroit Polic Officers Ass’n v Detroit,</i> 61 Mich App 487; 233 NW2d 49 (1975)	11
<i>Detroit Police Officers Ass’n v City of Detroit,</i> 391 Mich 441; 214 NW2d 803 (1974).....	15
<i>Grandville Muni Executive Ass’n v Grandville,</i> 453 Mich 428; 553 NW2d 917 (1996).....	10
<i>In re Complaint of Rovas Against SBC Michigan,</i> 482 Mich 90; 754 NW2d 259 (2008).....	10
<i>In re Payne,</i> 444 Mich 679; 514 NW2d 121 (1994).....	10
<i>Kent Co Deputy Sheriffs’ Ass’n v Kent Co Sherriff,</i> 238 Mich App 310; 605 NW2d 363 (1999)	19
<i>Local 1383, Int’l Ass’n of fire Fighters, AFL-CIO v City of Warren,</i> 411 Mich 642; 311 NW2d 702 (1981).....	16, 18
<i>Pontiac Fire Fighters Union Local 376 v Pontiac,</i> 482 Mich 10; 753 NW2d 595 (2008).....	9
<i>Pontiac Police Officers Ass’n v Pontiac,</i> 397 Mich 674; 246 NW2d 831 (1976).....	13, 15

	<u>Page</u>
<i>Port Huron Ed Ass’n v Port Huron Area School Dist</i> , 452 Mich 309; 550 NW2d 228 (1996).....	11
<i>Ranta v Eaton Rapids Pub Schs Bd of Ed</i> , 271 Mich App 261; 721 NW2d 806 (2006)	8
<i>Rochester Cmty Sch Bd of Ed v State Bd of Ed</i> , 104 Mich App 569; 305 NW2d 541 (1981)	11
<i>Rockwell v Crestwood Sch Dist Bd of Ed</i> , 393 Mich 616; 227 NW2d 736 (1975).....	10, 15, 16
<i>St Clair Intermediate Sch Dist v Intermediate Ed Assoc</i> , 458 Mich 540; 581 NW2d 707 (1998).....	7, 8
<i>Van Buren Co Ed Ass’n v Decatur Pub Schs</i> , 309 Mich App 630; 872 NW2d 710 (2015)	8, 9, 11, 14
<i>VanderWerp v Plainfield Charter Twp</i> , 278 Mich App 6243; 752 NW2d 479 (2008)	9
<i>Wayne County Civil Service Comm’n v Bd of supervisors</i> , 384 Mich 3634; 184 NW2d 201 (1971).....	15, 16

Statutes

26 USC 501	vii
MCL 15.562(e).....	passim
MCL 15.564.....	vi, 5, 6
MCL 15.564(2)	passim
MCL 390.55.....	12
MCL 421.215(1)	vi
MCL 423.201.....	3
MCL 423.215(1)	viii, 8, 11

Constitutional Provisions

Const 1963, art 6, § 1	10
Const 1963, art 5, §§ 5-6	12

Rules

MCR 7.301(2)	v
--------------------	---

STATEMENT OF JURISDICTION

This Court has jurisdiction under MCR 7.301(2) and the Court's Order of February 3, 2017, granting Shelby Township's Application for Leave to Appeal.

STATEMENT OF QUESTIONS PRESENTED

1. Whether the calculation and/or allocation of payments for medical benefit plan costs among employees under the Publicly Funded Health Insurance Contribution Act, 2011 PA 152, specifically MCL 15.564, is a mandatory subject of collective bargaining pursuant to the Public Employment Relations Act (PERA), specifically MCL 421.215(1).

Shelby Township answers: No.

Command Officers Association of Michigan answers: Yes.

Court of Appeals answered: Yes.

MERC answered: Yes.

Administrative Law Judge answered: Yes.

2. Whether PA 152, alone or in conjunction with PERA, precludes a public employer's use of illustrative insurance rates that include retiree health-insurance costs.

Shelby Township answers: No.

Command Officers Association of Michigan answers: Yes.

Court of Appeals answered: Yes.

MERC answered: Yes.

Administrative Law Judge answered: Yes.

3. Whether MERC erred in ruling that the Township committed an unfair labor practice because it did not unilaterally recalculate and implement a revised illustrative rate under Act 152.

The Court did not direct the parties to brief this question, and the Court of Appeals correctly held that Shelby Township failed to preserve it in briefing below.

STATUTES INVOLVED

MCL 15.564(2) (Publicly Funded Health Insurance Contribution Act— Public-employer contribution [PFHICA § 4(2)])

(2) For medical benefit plan coverage years beginning on or after January 1, 2012, a public employer shall pay not more than 80% of the total annual costs of all of the medical benefit plans it offers or contributes to for its employees and elected public officials. For purposes of this subsection, total annual costs includes the premium or illustrative rate of the medical benefit plan and all employer payments for reimbursement of co-pays, deductibles, and payments into health savings accounts, flexible spending accounts, or similar accounts used for health care but does not include beneficiary-paid copayments, coinsurance, deductibles, other out-of-pocket expenses, other service-related fees that are assessed to the coverage beneficiary, or beneficiary payments into health savings accounts, flexible spending accounts, or similar accounts used for health care. For purposes of this section, each elected public official who participates in a medical benefit plan offered by a public employer shall be required to pay 20% or more of the total annual costs of that plan. The public employer may allocate the employees' share of total annual costs of the medical benefit plans among the employees of the public employer as it sees fit. [Emphasis added.]

MCL 15.562(e) (Publicly Funded Health Insurance Contribution Act— Definitions, [PFHICA § 2(e)])

(e) “Medical benefit plan” means a plan established and maintained by a carrier, a voluntary employees' beneficiary association described in section 501(c)(9) of the internal revenue code of 1986, 26 USC 501, or by 1 or more public employers, that provides for the payment of medical benefits, including, but not limited to, hospital and physician services, prescription drugs, and related benefits, for public employees or elected public officials. Medical benefit plan does not include benefits provided to individuals retired from a public employer or a public employer's contributions to a fund used for the sole purpose of funding health care benefits that are available to a public employee or an elected public official only upon retirement or separation from service. [Emphasis added.]

**MCL 423.215(1) (Public Employment Relations Act—Collective Bargaining
[PERA § 15])**

(1) A public employer shall bargain collectively with the representatives of its employees as described in section 11 and may make and enter into collective bargaining agreements with those representatives. Except as otherwise provided in this section, for the purposes of this section, to bargain collectively is to perform the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or to negotiate an agreement, or any question arising under the agreement, and to execute a written contract, ordinance, or resolution incorporating any agreement reached if requested by either party, but this obligation does not compel either party to agree to a proposal or make a concession. [Emphasis added.]

INTRODUCTION

The Court has ordered the parties to address two legal issues. Both involve a straightforward application of plain, statutory language.

The first issue is whether Shelby Township's percentage allocation of health-care premium contributions is a mandatory subject of bargaining. The answer is yes. Long before the Legislature enacted the Publicly Funded Health Insurance Contribution Act, MCL 15.561 *et seq* (PFHICA), all public employers and employees understood that § 15 of the Public Employee Relations Act (PERA) required bargaining on health-insurance benefits. The PFHICA modified the PERA regime by requiring local governments to elect either a "hard cap" or a "not more than 80% of total healthcare costs" approach to containing employee healthcare costs.

If a local government elects the latter, 80/20 option, the PFHICA gives the government some flexibility as to how employee shares of costs would be allocated. But nowhere did the PFHICA exempt that allocation choice from PERA's bargaining requirement. Under the Township's view, it could require (1) 100% employee contributions, (2) 80% of its employees to pay 100% of their health care costs while allowing the other 20% to pay nothing, or (3) something else entirely, yet none of those decisions would be subject to mandatory collective bargaining. There is nothing in PFHICA or PERA that endorses such a result, and this Court's many PERA precedents say the exact opposite. *E.g., Central Michigan University Faculty Assoc v Central Michigan University*, 404 Mich 268, 279; 273 NW2d 21 (1978) ("PERA was intended by the Legislature to supersede conflicting laws and is superimposed even on those institutions which derive their powers from the constitution itself.").

The second issue is whether the Township can use a rate for its *active* employee's health-insurance premiums based on a plan that includes *retired* employees. The answer is no. The PFHICA's definition of "medical benefit plan" specifically excludes benefits to retired employees. MCL 15.562(e) ("Medical benefit plan does not include benefits provided to individuals retired from a public employer or a public employer's contributions to a fund used for the sole purpose of funding health care benefits that are available to a public employee or an elected public official only upon retirement or separation from service."). Thus, the Township may not use retiree-benefit costs to calculate active-employee premiums.

The Township attempts to inject a third legal issue for which this Court did not request briefing: whether the Michigan Employment Relations Commission (MERC) erred by ruling that the Township had a unilateral obligation to recalculate and implement a new illustrate rate for purposes of the PFHICA § 4 calculation. But the Township abandoned that issue in its briefing to the Court of Appeals. 12/15/15 Op, p 3, JA 491a ("[T]he Township provides no authority for the proposition that MERC may not order recalculation and reimbursement as a remedy. We conclude that the Township has abandoned this issue."). And the Township is wrong in asserting that the MERC lacks authority to compel a public employer to comply with the plain language of a Michigan statute, which is what happened here.

Accordingly, this Court should summarily affirm the Court of Appeals' opinion affirming the decision of the MERC. Alternatively, the Court should simply deny the Township's application for leave to appeal.

STATEMENT OF FACTS

I. The Township's refusal to collectively bargain

The Command Officers Association of Michigan is the certified bargaining representative on behalf of Shelby Township supervisory law enforcement officers and all other classifications within the certification of record.¹ The Township is an employer within the meaning of PERA, MCL 423.201 *et seq.* The parties' most recent collective bargaining agreement expired on December 31, 2010. 7/7/12 Hr'g Tr, pp 20-21, JA 37a.

In November 2011, the Association discovered that the Township intended to unilaterally implement certain provisions of the PFHICA effective January 1, 2012. Specifically, the Township intended to impose 80/20 cost sharing on the Command and Dispatch groups, in addition to Act 54 increases. *Id.* at 30–34, JA 40a. On November 22, 2011, the Union objected to this unilateral implementation and demanded collective bargaining, resulting in a negotiation session to discuss possible plans. *Id.* at 48, JA 44a.

On January 13, 2012, the Township's medical-insurance advisor stated that, effective January 1, 2012, the Township had unilaterally placed into effect the Township's new medical-benefits plan, even though the benefits plan did not renew until February 1, 2012. *Id.* at 59–60, JA 47a. As a result, an Association member electing full-family coverage who had paid a premium share of \$400 per year before

¹ The caption was requested to be changed in this case effective upon appeal/response to the Court of Appeals to *Shelby Township v. Shelby Township Command Officers Association*, as Command Officers Association of Michigan does not represent Shelby Township Command Officers in this case. The caption was not used by the Court of Appeals in its decision on December 15, 2015.

January 1, 2012, now was required to pay \$360 per *month*. 5/31/13 ALJ Decision & Order, p11, JA 181a. This \$360 constituted 25.67% of the monthly cost of that member's insurance. *Id.* at 12, JA 182a. Contributing to the massive increase, the Township calculated the total annual costs for medical-insurance coverage by including not only the annual costs for active employees, but the medical-insurance costs of retirees as well. 7/7/12 Hr'g Tr, pp 53-54, JA 45a-46a.

II. The charging document

On April 3, 2012, the Association filed four charges of unfair labor practices:

1. The Township's unilateral action in implementing the PFHICA—before the medical-benefit-plan coverage renewal on February 1, 2012—was a violation of the statute and a unilateral implementation of premium-sharing costs without prior notice nor bargaining in good faith, a violation of PERA §§ 9, 10(1)(e), and 15.
2. The Township's unilateral implement of a 20% employee premium sharing of medical insurance costs, plus passing on the full cost of the medical-insurance-plan premium rate increase (February 1, 2011, to February 1, 202, rate change) pursuant to PA 54 of 2011 represented an impermissible stacking of premium-sharing costs in excess of that recognized under PA 54 and PFHICA, as well as a violation of the duty to bargain in good faith, a violation of PERA §§ 9, 10(1)(e), and 15.
3. The Township's unilateral implementation of medical-insurance premium sharing on Association members was not the same premium sharing imposed on non-union employees, a violation of PERA § 10(1)(c).
4. And the Township's unilateral imposition of impermissible premium-sharing calculations without good-faith bargaining violated PFHICA and PERA §§ 9, 10(1)(e), and 15. JA 2a-8a.

PROCEEDINGS BELOW

I. ALJ Decision and Recommended Order

ALJ Julia C. Sterns concluded that the Township violated its duty to bargain over the amount and calculation of employee premium shares. After PFHICA's enactment, a public employer "continues to have a duty to bargain over health insurance issues." 5/31/13 Decision & Rec Order, p 14, JA 184a (quoting *Decatur Pub Schs*, MERC Case Nos C12 F-123/12-001178 and C12 F-124/12-001180). And while the PFHICA states that a public employer selecting the 80/20 option can "allocate the employees' share of total annual costs of the medical benefit plans among the employees of the public employer as it sees fit," MCL 15.564(2), Michigan courts and MERC have consistently interpreted statutes granting discretionary authority over some aspect of the employment relationship to continue requiring a duty to participate in collective bargaining under PERA. *Id.* at 16, JA 186a.

Here, for example, PFHICA requires only that an employer "pay no more than 80%" of its employees' and elected officials' total annual medical costs." MCL 15.564. "Under the plain language of the statute, an employer could choose to pay less than 80%—or none—of these costs." 5/31/13 Decision & Rec Order, p 16, JA 186a. And even if an employer agrees to pay 80%, there are different methods of allocating the other 20%. *Id.* In other words, PFHICA gives an employer the right "to favor one group of employees over another in the allocation of the total health care cost burden." *Id.* And because such discretion affects public-employee terms and conditions of employment, they are subject to mandatory bargaining. *Id.*

In reaching that conclusion, the ALJ recognized that bargaining with several different groups of represented employees could be “complicated.” *Id.* at 17, JA 187a. But that does not mean that the employer is excused from the requirement (or, for that matter, to agree to any particular group’s demands). *Id.*

As for the Township’s use of “bundled” illustrative rates to calculate the total cost of the plan, the ALJ found the Township’s actions contrary to PFHICA’s plain language. *Id.* at 20, JA 190a. Section 2(e) of PFHICA excludes benefits provided to retirees from the definition of “medical benefit plan.” MCL 15.562(e). Since “total annual costs” under MCL 15.564 are calculated using the “illustrative rate of the [employer’s] medical benefit plan(s),” § 2(e) requires that retiree costs be excluded in the illustrative rates used to calculate the employer’s total costs and, by extension, the employee’s premium share. 5/31/13 Decision & Rec Order, p 20, JA 190a. This system makes sense, said the ALJ, since the Township’s approach would result in employees subsidizing retirees in plans that include retired employees and no subsidization for employees in plans that do not. *Id.* Unsurprisingly, the Association members’ premiums here would be lower if retiree costs are excluded. *Id.* Accordingly, the Township violated its duty to bargain under PERA by unilaterally requiring Association members “to pay a premium share that was calculated on the basis of illustrative rates that included retiree costs.” *Id.*

II. MERC

MERC adopted the ALJ's recommendation and order in all pertinent respects. Starting with the duty to bargain, MERC noted that the Legislature's adoption of the PFHICA "did not alter the duty to bargain under PERA." 8/18/14 MERC Decision & Order, p 7, JA 310a. When an employer chooses the 80/20 option, PFHICA "does not determine the amount to be allocated to particular employees or bargaining units." *Id.* The employer and a bargaining unit "may agree that the allocation of health care costs to members of that bargaining unit may be more than or less than twenty percent, as long as the total amount of health care costs to be paid by the employer is no more than eighty percent." *Id.* Allocation of the employees' share of medical-benefit-plan costs, "just as before the adoption of [PFHICA], continues to be a mandatory subject of bargaining." *Id.* at 8, JA 311a (citing *St Clair Intermediate Sch Dist v Intermediate Ed Assoc*, 458 Mich 540, 551; 581 NW2d 707 (1998)). The Township had a duty to bargain "over the calculation method and the total amount of the employee contributions." *Id.*

Turning to the use of illustrative rates that included retiree costs, MERC agreed with the ALJ that the Township's inclusion of such costs "is not permissible under [PFHICA]." *Id.* at 10, JA 313a. MCL 15.564(2) requires that a public employer pay no more than 80% "of all the medical benefit plans it offers or contributes to," and MCL 15.562(e) defines "medical benefit plan" to exclude benefits provided to retired individuals. *Id.* "The record," said MERC, "shows that the illustrative rates were significantly lower when calculated without including

costs attributable to retirees.” *Id.* And once the Township “was aware of the amount of the unbundled illustrative rate,” MERC concluded, the Township “had an obligation to recalculate the employees’ share of health care costs.” *Id.*.

III. Court of Appeals

The Michigan Court of Appeals affirmed in a unanimous, unpublished, *per curiam* decision. 12/15/15 COA Op, JA 489a. With respect to the issue of bargaining, the Court noted that PERA “requires public employees to bargain about wages and conditions of employment,” and “[h]ealth insurance benefits are a mandatory subject of bargaining.” *Id.* at 2–3, JA 490a–491a (citing MCL 423.215(1) and *Ranta v Eaton Rapids Pub Schs Bd of Ed*, 271 Mich App 261, 270; 721 NW2d 806 (2006)). While a public employer does not have a duty to bargain about whether to adopt the “hard cap” or “percentage” option for employee medical-plan contributions, “a public employer *must* bargain about the amount that specific employee groups will pay toward the employees’ portion of the contribution.” *Id.* at 3, JA 491a (citing *Van Buren Co Ed Ass’n v Decatur Pub Schs*, 309 Mich App 630, 643, 645–646; 872 NW2d 710 (2015)). The Court held that MERC did not err in concluding that the Township, having chosen the “percentage” option, had a duty “to bargain over the percentages that the employee groups would contribute.” *Id.* That decision was consistent with the “Court’s interpretation of the same statutory language in *Van Buren*.” *Id.* Accordingly, the MERC did not err. *Id.*

As for the bundled insurance rates, the Court of Appeals again concluded that MERC did not err as a matter of law in determining that the Township “could

not use a rate for its employees' premiums that included benefits for retired employees." *Id.* "The definition of 'medical benefit plan' specifically *excludes* benefits to retired employees" under the PFHICA. *Id.* (citing MCL 15.562(e)). Yet the Township chose to use a bundled rate that "included retirees' costs," even though the unbundled rate was available to the Township "before the employee's insurance plan renewed on February 1, 2012." *Id.*

Finally, the Court of Appeals rejected the third issue that the Township attempts to insert into the proceeding before this Court: whether MERC improperly ordered the Township to unilaterally recalculate premium rates. *Id.* The Court of Appeals observed that "the township provides no authority for the proposition that MERC may not order recalculation and reimbursement as a remedy." *Id.* Accordingly, "the Township has abandoned this issue." *Id.* (citing *VanderWerp v Plainfield Charter Twp*, 278 Mich App 624, 633; 752 NW2d 479 (2008)). In any event, said the Court, MERC "may impose any remedy that would make affected employees whole." *Id.* at 4, JA 492a (citing *Pontiac Fire Fighters Union Local 376 v Pontiac*, 482 Mich 1, 10; 753 NW2d 595 (2008)).

STANDARD OF REVIEW

Michigan courts review MERC decisions to determine whether the decision is authorized by law and MERC's findings are supported by competent, material, and substantive evidence. Const 1963, art 6, § 28; *Grandville Muni Executive Ass'n v Grandville*, 453 Mich 428, 436; 553 NW2d 917 (1996). Substantial evidence is evidence a reasonable person would accept to support a conclusion. *In re Payne*, 444 Mich 679, 692; 514 NW2d 121 (1994) (Boyle, J). While MERC's legal conclusions are not binding on the courts, Michigan courts afford such conclusions respectful consideration. See *In re Complaint of Rovas Against SBC Michigan*, 482 Mich 90, 97, 103; 754 NW2d 259 (2008).

ARGUMENT

I. The Court of Appeals and MERC did not err in holding that a local government's discretionary allocation of health-benefit costs among employee groups is subject to mandatory collective bargaining.

A. PERA § 15 regulates public employer-employee relations and should be construed broadly to protect employees.

This Court has consistently held that PERA is the dominant law regulating public-employee labor relations. E.g., *Rockwell v Crestwood Sch Dist Bd of Ed*, 393 Mich 616, 629; 227 NW2d 736, 741 (1975). That dominance is predicated on article 4, § 48 of the Michigan Constitution of 1963 and "the apparent legislative intent that the PERA be the governing law for public employee labor relations." *Id.* at 630. Accord, e.g., *Detroit Bd of Ed v Parks*, 98 Mich App 22, 36; 296 NW2d 815 (1980) (PERA "must supersede any other law in conflict with it."); Twp Br, p 18.

If possible, statutory provisions pertaining to a specific subject matter, like PERA and PFHICA, should be construed together and harmonized if possible. *Brady v Detroit*, 353 Mich 243, 248; 91 NW2d 257 (1958). Separate statutes that relate to the same subject matter are considered *in pari materia* and must be read as though parts of the same law, even though enacted at different times and without reference to each other. *County Road Ass’n of Michigan v Bd of State Canvassers*, 407 Mich 101, 119; 282 NW2d 774 (1979). Each statute must be given effect to the extent that can reasonably be done. *Rochester Cmty Sch Bd of Ed v State Bd of Ed*, 104 Mich App 569, 578–579; 305 NW2d 541 (1981).

In determining whether an issue is a subject of mandatory bargaining, courts consider that Michigan public employees are forbidden to strike. Accordingly, “Section 15 of PERA must be even more expansively construed . . . to adequately protect public employees’ rights.” *Detroit Polic Officers Ass’n v Detroit*, 61 Mich App 487, 491; 233 NW2d 49, 50–52 (1975).

PERA § 15 states that a “public employer shall bargain collectively with the representatives of its employees . . . with respect to wages, hours, and other terms and conditions of employment.” MCL 423.215(1). Because healthcare benefits are a term and condition of employment, courts have conclusively held that such benefits are a subject of mandatory collective bargaining. E.g., *Port Huron Ed Ass’n v Port Huron Area School Dist*, 452 Mich 309, 317 n12; 550 NW2d 228 (1996) (“Insurance benefits are a mandatory bargaining subject.”) (citation omitted); *Van Buren Co Ed Ass’n*, 309 Mich App at 643, 645–646; Twp Br, p 18. With that context, it is appropriate to consider the interaction of PERA § 15 and the PFHICA.

B. PFHICA § 4 cost allocation is subject to PERA § 15 mandatory bargaining.

Once a public employer elects the 80/20 healthcare-cost allocation under PFHICA § 4, the employer “may allocate the employees’ share of total annual costs of the medical benefit plans among the employees of the public employer as it sees fit,” provided that the employer pays no more than 80% of the total annual costs of *all* medical-benefit plans it offer or contributes to, and further provided that any elected public official pays 20% or more of the total annual costs of that plan. MCL 15.564(2). The Township focuses on the phrase “as it sees fit” and concludes that it has discretion to unilaterally impose any allocation plan it wants. But that conclusion is wrong. When reading any statutory grant of discretion to a public employer in *pari materia* with PERA § 15, the employer’s decision to exercise that discretion is subject to mandatory collective bargaining unless the discretion-granting statute clearly states the contrary. Here, PFHICA does not.

For example, in *Central Michigan University Faculty Assoc v Central Michigan University*, 404 Mich 268; 273 NW2d 21 (1978), this Court considered an unfair-labor-practice charge arising out of the University’s adoption of a program that allowed students as well as department faculty to evaluate faculty members. The question was whether the evaluation program was a subject of mandatory collective bargaining under PERA § 15. The University argued that it had plenary discretion to implement the program under article 5, §§ 5-6 of the Michigan Constitution of 1963 and MCL 390.554, which expressly delegated to the University plenary power over personnel matters. No matter. As this Court had previously concluded in the context of home-rule cities, “PERA was intended by the Legislature to supersede

conflicting laws and is superimposed even on those institutions which derive their powers from the constitution itself.” 404 Mich at 279 (citing *Pontiac Police Officers Ass’n v Pontiac*, 397 Mich 674; 246 NW2d 831 (1976)). “The statutory test of the PERA is whether the particular aspect of the employment relationship is a ‘term or condition of employment.’” *Id.* at 280. “If institutions of higher education are indeed different from other public employers, the Legislature could have specifically excluded them from coverage under the PERA. Any exemption or exclusion of public employers from the PERA is the Legislature’s prerogative, not that of MERC or the appellate courts.” *Id.* at 281. In other words, “the unique status accorded state universities by constitutional and statutory authority does not alter the scope of their collective bargaining obligations under the PERA.” *Id.* “If university professors are truly unique and thus different from other public employees, the Legislature must carve out an exception to the PERA. This Court cannot.” *Id.*

So too here. It cannot be disputed that the cost of healthcare benefits is a “term or condition of employment.” Accordingly, PERA § 15 subjects those benefits to mandatory collective bargaining. If the Legislature intended to exclude from collective bargaining a public employer’s allocation of costs in PFHICA, it could have done so expressly. The Legislature chose not to do that, and the courts cannot read PFHICA § 4 as though the Legislature did. That was the reasoned conclusion of the Administrative Law Judge, the MERC, and the unanimous, *per curiam* Court of Appeals. 5/31/13 Decision & Rec Order, p 16, JA 186a (“[S]tatutes granting discretionary authority over some aspect of the employment relationship to a particular [public official or body] . . . have not been interpreted as eliminating the

duty to bargain over this issue under PERA.”); 8/18/14 MERC Decision & Order, p 7–8, JA 310a–311a (“Where a public employer elects to pay the eighty percent employer share under § 4, Act 152 does not determine the amount to be allocated to particular employees or bargaining units. . . . This cost, just as before the adoption of Act 152, continues to be a mandatory subject of bargaining.”); 12/15/15 COA Op, p 3, JA 491a (“[A] public employer must bargain about the amount that specific employee groups will pay toward the employees’ portion of the contribution.”) (citing *Van Buren*, 309 Mich App at 645–646).

That result makes sense not only as a matter of law, but of common sense. Under PFHICA § 4’s plain language, a public employer could choose to pay less than 80% of health plan costs, including no costs at all. The percentage allocated to the public employer and to the employees is subject to mandatory collective bargaining. Similarly, even if the public employer chose to pay 80%, it could require all employees to pay the same share of the public employer’s total annual health plan costs even if some employees were part of plans with higher per-employee costs than others. Such an allocation is subject to mandatory collective bargaining. Alternatively, a public employer could require non-union employees to pay less than 20% and require unionized employees to make up the difference. Again, that choice is subject to mandatory collective bargaining. Or a public employer could require 80% of its employees (including all elected officials) to pay 100% of the plan costs, and exempt the other 20% of employees from paying anything. Such unfettered cost allocation is exactly the type of subject for which PERA § 15 requires a mandatory negotiation.

Here, Shelby Township unilaterally imposed a requirement that each Association members pay 25.67% of his or her healthcare costs. That allocation is certainly a permissible outcome under PFHICA § 4, just as a student-evaluation process was a permissible outcome for Central Michigan University and its faculty under the plenary power that Michigan law grants to public universities. But just as in the CMU case, the Township's discretionary allocation here must be negotiated with the Association under PERA § 15. Absent an express legislative exemption from the PERA, the allocation of healthcare costs are always subject to mandatory collective bargaining.

As noted above, the Township places all its chips on the phrase "as it sees fit" in PFHICA § 4. Twp Br, pp 20–24. In the abstract, the Association agrees that this phrase gives the Township discretion over how to allocate the 80% requirement. What the Township fails to recognize is that even discretionary decisions of public employers are subject to mandatory collective bargaining under PERA § 15; circumventing § 15 requires express statutory language to that effect. *Rockwell*, 393 Mich at 628–629 ("[T]o the extent there is conflict . . . the PERA is to govern."); *Detroit Police Officers Ass'n v City of Detroit*, 391 Mich 44, 61; 214 NW2d 803 (1974) (holding that residency and retirement benefits are mandatory subjects of collective bargaining under the PERA, although provisions of a city's ordinance and charter, promulgated under the Home Rule Act, would ordinarily govern); *Wayne County Civil Service Comm'n v Bd of supervisors*, 384 Mich 363, 374; 184 NW2d 201 (1971) (original authority and duty of the Commission was diminished *pro tanto* by the PERA); *Pontiac*, 397 Mich at 684 ("If the Legislature deems it appropriate to

redefine the scope of the collective bargaining obligation of the public employers . . . it may do so.”); *Central Michigan University*, 404 Mich at 281 (despite public universities’ plenary power, they are still subject to the PERA; “the Legislature must carve out an exception to the PERA. This Court cannot.”). In the absence of such language here, PERA § 15 governs. That is the end of the analysis.

The Township also argues that the PFHICA somehow diminishes PERA “*Pro tanto*,” i.e., that because the statutes conflict (a premise the Association rejects), PFHICA controls over PERA. Twp Br, pp 24–27. But this Court’s precedents say the exact opposite. *E.g.*, *Wayne County Civil Service Comm’n*, 384 Mich at 374 (Commission’s power was reduced “*Pro tanto*” by the PERA); *Rockwell*, 393 Mich at 630 (“The analysis is the same whether we label this reconciliation repeal by expression or by implication, *Pro tanto* diminishing or harmonizing. The supremacy of the provisions of the PERA is predicated on the constitution (Const 1963, art 4, § 48) and the apparent legislative intent that the PERA be the governing law for public employee labor relations.”); *Bd of Ed of School Dist for City of Detroit v Parks*, 417 Mich 268, 280; 335 NW2d 641 (1983) (“Where there is a conflict between PERA and another statute, PERA prevails, diminishing the conflicting statute *pro tanto*.”) (citing *Local 1383, Int’l Ass’n of fire Fighters, AFL-CIO v City of Warren*, 411 Mich 642; 311 NW2d 702 (1981)).

The Township invites this Court to disregard these decades of PERA precedents because the PFHICA “is a more specific and more recently enacted law.” Twp Br, p 27. But PFHICA is not specific enough—it does not specifically exempt

healthcare-cost allocation from PERA § 15. And accepting the Township’s invitation would wreak havoc on Michigan labor law. This Court should reject it.

II. The Court of Appeals and MERC did not err in holding that a local government must exclude retiree costs when calculating the appropriate rate for active-employee healthcare costs.

The question whether the Township may include retiree costs when calculating cost sharing for active employees is just as straightforward. Under PFHICA § 4(2), a public employer electing the 80/20 option may pay no more than “80% of the total annual costs of all of the *medical benefit plans* it offers or contributes to for its employees and elected public officials.” MCL 15.564(2). PFHICA § 2(e) then continues by defining a “medical benefit plan” to exclude “benefits provided to individuals retired from a public employer.” MCL 15.562(e). Accordingly, under the plain statutory language, the “total annual costs of all of the medical benefit plans” that a public employer offers or contributes to does not include the costs for medical benefits plans the employer offers or contributes to for retirees.

Again, the unambiguous statutory language comports with common sense, because including retiree health benefits will always have the effect of increasing plan costs, as the record showed here. If an active employee’s plan cost \$300/month, and adding a retiree increases the plan cost to \$3,000/month, requiring the employee to pay 20% of the collective cost would actually result in the employee paying *more* than 100% of the employee’s benefit costs. In addition, as the Administrative Law Judge, noted, some public-employer health plans cover both

active and retired employees, while others (such as plans for public school employees) do not. If a public employer could include retiree costs in its total healthcare-plan costs, “employees in plans that include retirees would in effect be forced to subsidize retiree benefits while other employees would not.” 5/31/13 Decision & Rec Order, p 20, JA 190a. Particularly where the Township has given no reason why it could not have calculated costs without including retirees, the Township violated the PFHICA.

The Township argues that because it has the unilateral power to allocate employee shares of total medical costs, it must also have the power to calculate what those costs are. Twp Br, pp 27–28. To begin, as explained at length above, the Township does *not* have that unilateral power; the allocation of healthcare costs is subject to mandatory, collective bargaining. Equally important, just because the Township has the power to calculate does not mean the Township can calculate in a manner that conflicts with the express statutory language. This is true despite the so-called “predicate-act canon,” Twp Br, p 27, which does not purport to nullify statutory commands.

Alternatively, the Township suggests that PFHICA § 4(2) does not address the methodology of calculating insurance premiums or illustrative rates. Twp Br, pp 29–33. Specifically, the Township relies on a Department of Treasury interpretation of the statute that reads the exclusion of “benefits provided to individuals retired” as clarifying that PHFICA’s spending limits apply only to expenditures for medical benefits plans for active employees. *Id.*

The Township is wrong on several levels. As the *per curiam* Court of Appeals explained, the Treasury interpretation was a non-binding “frequently asked questions” document that did not even apply to the 80/20 option the Township chose here. 12/15/15 COA Op, p 3 & n1, JA 491. Moreover, such a document “does not supersede MERC’s interpretation,” where “MERC has sole jurisdiction to resolve issues involving unfair labor practices.” *Id.* at 3, JA 491 (citing *Kent Co Deputy Sheriffs’ Ass’n v Kent Co Sheriff*, 238 Mich App 310, 313; 605 NW2d 363 (1999)). Most important, the Township simply gets its statutory interpretation wrong. If “total annual costs” under PHFICA § 4 are calculated using the “illustrative rate of the [employer’s] medical benefit plan(s),” and medical benefit plans are defined to exclude benefits to retirees, then total annual costs must be calculated without including retiree benefits. This is not a complicated analysis.

Finally, the Township says it may calculate total annual healthcare costs any way it chooses because PERA does not preclude the use of retiree claims experience. *TwP Br*, pp 33–34. That makes no sense. PHFICA § 4 expressly excludes retiree benefits when calculating total annual plan costs. PERA’s *silence* does not give the Township the power to calculate total costs a different way. Accordingly, the Administrative Law Judge, the MERC, and the Court of Appeals all correctly ruled against the Township’s attempt to artificially inflate employee healthcare costs by including the costs of retiree benefits.

III. The Township has not preserved the question regarding MERC's authority to order unilateral recalculation and reimbursement.

The Township lastly raises an issue for which this Court did not request briefing—whether the “Township had a unilateral obligation to recalculate and implement a new illustrate rate for purposes of the Act 152 calculation.” Twp Br, pp 34–38. That issue is problematic for the Township, because as even the Township concedes, the Court of Appeals held that the township abandoned the argument altogether in proceedings below. 12/15/15 COA Op, pp 3-4, JA 491a–492.

Just as important, the Court of Appeals correctly left the decisions of the Administrative Law Judge and the MERC in place. The Township asserts that a public employer is prohibited from taking unilateral action affecting a mandatory subject of bargaining. Twp Br, p 36. The Association agrees, and if the MERC had directed the Township to unilaterally impose a new health-care allocation scheme, such a directive would have violated the principle the Township highlights.

But the question whether the Township may include retiree costs when calculating its total healthcare plan costs is *not* a mandatory subject of bargaining. The question is definitively answered by PHFICA § 4 itself: the Township may not finance its retirees' healthcare costs by allocating those costs to active employees. As a result, there was no further authority or explanation needed for the MERC's adoption of the Administrative Law Judge's recommended remedy.

CONCLUSION AND RELIEF REQUESTED

The Township's arguments on appeal contradict this Court's long-settled precedents and the plain language of the relevant statutory provisions. Accordingly, the Command Officers Association of Michigan respectfully requests that this Court affirm the Court of Appeals in all respect. Alternatively, the Association asks that the Court simply deny the Township's application for leave to appeal.

Respectfully submitted,

James R. Andary (P10165)
ANDARY ANDARY DAVIS &
ANDARY
10 S Main Street, Suite 405
Mount Clemens, Michigan 48043
(586) 463-9883
jamesrandary@andarydavislaw.com

John J. Bursch (P57679)
BURSCH LAW PLLC
9339 Cherry Valley Ave SE, #78
Caledonia, Michigan 49316
(616) 450-4235
jbursch@burschlaw.com

Dated: May 24, 2017